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No. 09-1374

Supreme Court, U.S.
FILED
JUL. 12 2010
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

MELVIN STERNBERG,
STERNBERG & SINGER, LTD.,

Petitioners,

v.

LOGAN T. JOHNSTON, III,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTRODUCTION 1

REASONS FOR DENYING THE WRIT 2

I. The Question Presented Was Neither Raised Nor Decided Below. 2

II. This Case Does Not Implicate A Circuit Split Over the Availability of Emotional-Distress Damages. 4

CONCLUSION 6

TABLE OF AUTHORITIES

Cases

Aiello v. Providian Financial Corp.,
239 F.3d 876 (7th Cir. 2001) 1, 4, 5

Dawson v. Washington Mutual Bank,
390 F.3d 1139 (9th Cir. 2004) 2

Delta Airlines v. August,
450 U.S. 346 (1981) 1

Fleet Mortgage Group, Inc. v. Kaneb,
196 F.3d 265 (1st Cir. 1999) 4, 5

United States v. United Foods,
533 U.S. 405 (2001) 3

Youakim v. Miller,
425 U.S. 231 (1976) 2

Statutes

11 U.S.C. § 362(k)(1).....1, 2, 3, 4

Miscellaneous

Eugene Gressman, et al.
Supreme Court Practice (9th ed. 2007) 2

INTRODUCTION

Petitioners Melvin Sternberg and his law firm Sternberg & Singer (collectively "Sternberg") ask this Court to grant certiorari to decide a question that was neither raised nor decided below—namely, whether an individual injured by a willful violation of the automatic stay may ever recover damages for emotional distress under 11 U.S.C. § 362(k)(1). Because "that question was not raised in the Court of Appeals," it is "not properly before [this Court]." *Delta Airlines v. August*, 450 U.S. 346, 362 (1981). Sternberg's brief below acknowledged that emotional-distress damages are available under settled law and argued only that the evidentiary standards for recovering such damages had not been satisfied on the facts of the case.

Even if the question presented had been properly preserved, review would be unwarranted because this case does not implicate a circuit split concerning emtional-distress damages. In fact, no circuit has held that emotional-distress damages are unavailable where, as here, an individual has suffered both financial and non-financial injury as a result of an automatic-stay violation. Sternberg's claimed split rests entirely on *Aiello v. Providian Finance Corp.*, 239 F.3d 876 (7th Cir. 2001), but *Aiello*'s holding was premised on the lack of any financial injury in that case. *See id.* at 879 ("No financial injury is alleged in this case, and we do not think that emotional injury is compensable under section 362[(k)(1)] when there is no financial loss[.]"). Here, by contrast, the court below concluded that respondent Logan Johnston suffered *both* financial and non-financial loss and awarded damages for both types of injury. Pet. App. 8. Accordingly, no precedent in any circuit would categorically foreclose the damages awarded in this case.

REASONS FOR DENYING THE WRIT

I. The Question Presented Was Neither Raised Nor Decided Below.

Sternberg's petition asks this Court to decide whether damages for emotional distress are ever recoverable as "actual damages" under 11 U.S.C. § 362(k)(1). But Sternberg never raised that question in the court of appeals and the court of appeals did not decide it. The question presented, therefore, is not properly before this Court. *See Youakim v. Miller*, 425 U.S. 231, 234 (1976) ("Ordinarily, this Court does not decide questions not raised or resolved in the lower court."); Eugene Gressman, et al., *Supreme Court Practice* 464-65 (9th ed. 2007).

In his brief below, Sternberg did not argue, as he does now, that damages for emotional distress are categorically unavailable under section 362(k)(1). To the contrary, Sternberg expressly "recognize[d]" that the statute, under settled precedent, "provides for money awards for a cognizable claim for emotional distress." Sternberg CA9 Br. 19 (citing *Dawson*, 390 F.3d 1139). Sternberg did not challenge that prevailing interpretation. *See id.* at 20 n.7 (explaining, without criticizing, *Dawson*'s reasoning).

Instead, Sternberg argued only that the bankruptcy court had abused its discretion in awarding damages for emotional distress on the facts of the case. Specifically, Sternberg made three case-specific arguments: *first*, that the violation of the automatic stay in this case was not sufficiently egregious to justify the award of damages (*id.* at 19-23); *second*, that the award in this case was not supported by sufficient corroborating evidence (*id.* at 23-26); and *third*, that Johnston's damages claim

should have been barred on grounds of waiver and preclusion by the bankruptcy court's evidentiary rulings (*id.* at 26-28).

Aside from its summary rejection of all three arguments in a single footnote, the decision below contains no discussion of emotional-distress damages. App. 9. n.1. Because Sternberg did not raise it, the court did not mention, let alone decide, the question presented in the petition. This Court ordinarily does not "allow a petitioner to assert new substantive arguments attacking, rather than defending, the judgment when those arguments were not pressed in the court whose opinion we are reviewing, or at least passed upon by it." *United States v. United Foods*, 533 U.S. 405, 417 (2001).

Even after the panel had issued its decision and Johnston had sought rehearing en banc on the issue of attorneys' fees—when the parties were no longer even arguably constrained by circuit precedent—Sternberg still did not contest the proposition that emotional-distress damages are available under section 362(k)(1). Indeed, Sternberg's response to Johnston's en banc petition stated that "[t]he panel's opinion . . . properly interpreted 11 U.S.C. 362(k)(1), followed proper rules of statutory construction, and did not create an intra-circuit split in the interpretation of 11 U.S.C. 362(k)(1)." Sternberg CA9 Answer to Pet. for Rehearing En Banc at 2.

The court of appeals thus never had the opportunity in this case to address the argument that Sternberg now advances concerning the availability of emotional-distress damages under section 362(k)(1). And, as explained below, review of that question would be particularly inappropriate because no circuit has foreclosed the recovery of emotional distress damages for violations of

the automatic stay under the circumstances presented here.

II. This Case Does Not Implicate a Circuit Split Over the Availability of Emotional-Distress Damages.

Sternberg principal argument in favor of certiorari is that this case implicates a circuit split over whether emotional-distress damages are ever recoverable for violations of the automatic stay. Pet. 7-11. In fact, no circuit has foreclosed the recovery of emotional-distress damages where, as here, an individual has suffered both financial and non-financial harm.

The claimed split hinges on Sternberg's contention that a single Seventh Circuit decision, *Aiello*, 239 F.3d 876, "held that damages resulting from emotional distress are not available" for automatic-stay violations. Pet. 7. But *Aiello* did not foreclose the recovery of such damages where the individual has also suffered financial injury. To the contrary, the Seventh Circuit's decision was premised in part on the lack of any allegation of financial injury in that case. *Id.* at 879 ("No financial injury is alleged in this case, and we do not think that emotional injury is compensable under section 362[(k)(1)] when there is no financial loss[.]"); *see Dawson*, 390 F.3d at 1148 ("The Seventh Circuit, in *Aiello* . . . required that an individual suffer a financial loss in order to claim emotional distress damages.").

Indeed, *Aiello* expressly distinguished *Fleet Mortgage Group, Inc. v. Kaneb*, 196 F.3d 265, 269-70 (1st Cir. 1999), a case in which the First Circuit awarded emotional-distress damages under section 362(k)(1), because *Fleet Mortgage* involved both financial and non-financial loss. In *Fleet Mortgage*, the Seventh Circuit explained,

the "misconduct of the defendant in violating the automatic stay imposed substantial legal costs on the plaintiff, which are not alleged here." *Aiello*, 239 F.3d at 880; *see also id.* at 878 (describing *Fleet Mortgage* as "distinguishable" on this basis).

Under the Seventh Circuit's own logic, then, this case is likewise "distinguishable." *Id.* In this case, the court below held that Johnston suffered *both* financial and nonfinancial loss and awarded damages for both types of injury. *See* App. 8 (affirming the bankruptcy court's award of financial damages to Johnston "because the stay violation had hindered his ability to work"). This case therefore does not implicate a circuit split. No precedent in any circuit would categorically foreclose the damages awarded in this case.

Sternberg's petition attempts to dismiss this critical factual difference between *Aiello* and the decision below by characterizing *Aiello*'s acknowledgement that emotional-distress damages may be awarded when accompanied by financial loss as describing only a "theoretical possibility." Pet. 8. To be sure, *Aiello* did not squarely hold that emotional-distress damages are recoverable when accompanied by financial injury; the Seventh Circuit merely speculated that such damages could be recovered in light of bankruptcy's equitable "clean up" doctrine, as a means of "topping off" financial damages with other damages suffered, "including emotional distress if adequately proved." *Aiello*, 239 F.3d at 879. But the decision discussed this as a "theoretically possibility" only because that case did not involve an allegation of financial damages. That the Seventh Circuit has not yet had occasion to address the question in a case in which it was actually presented is further reason to deny certiorari.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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